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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ANDREW ALFRED TOVAR, Defendant and Appellant.	E064191 (Super.Ct.No. RIF1400717) O P I N I O N

APPEAL from the Superior Court of Riverside County. Becky Dugan, Judge. Affirmed.

Susan L. Ferguson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Scott C. Taylor and Junichi P. Semitsu, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant and appellant, Andrew Alfred Tovar, filed a petition to reduce his 2014 felony conviction for receiving stolen property (Pen Code, § 496, subd. (a))[1] to a misdemeanor under Proposition 47 (the Safe Neighborhoods and Schools Act) (§ 1170.18). The trial court denied his petition on the ground that defendant had not shown the value of the stolen property was less than $950. On appeal, defendant contends the People bore the burden of showing the value of the stolen property exceeded $950. We affirm the trial court's order without prejudice to defendant filing a subsequent petition supplying evidence of his eligibility for resentencing.

II. FACTS AND PROCEDURE

In February 2014, the People filed a petition to revoke defendant's mandatory supervision and an amended felony complaint charging defendant with receiving stolen property. The alleged stolen property included an iPad, laptop, headphones, money, and sunglasses. The complaint also alleged that defendant had served five prior prison terms (§ 667.5, subd. (b)) and had one prior strike (§§ 667, subds. (c), (e)(1), 1170.12, subd. (c)(1)). Defendant pled guilty. In March 2014, the court sentenced defendant to state prison for a total term of two years eight months.

"California voters approved Proposition 47 on November 4, 2014, and it became effective the next day." (*People v. Bush* (2016) 245 Cal.App.4th 992, 1000.) Defendant filed his petition for resentencing under Proposition 47 in January 2015, when he was still

[1] All further statutory references are to the Penal Code unless otherwise indicated.

serving his state prison sentence. The petition simply cited Proposition 47 and requested that he be resentenced. The People's response opposed resentencing on the ground that the stolen property was worth more than $950, per the police report. Defendant filed a brief in reply arguing there was no evidence that the value of the stolen property exceeded $950. At the hearing on the petition, the prosecutor again represented that the police report described the value of the stolen property as exceeding $950. The prosecutor did not proffer the police report itself, and it does not appear in the record. Defense counsel objected but did not offer any evidence to contradict the prosecutor's argument. The court denied the petition for resentencing "based on no evidence by the petitioner that the amount was under $950."

III. DISCUSSION

Defendant argues that the People had the burden of establishing the value of the stolen property and thus showing his ineligibility for resentencing. This argument is not well taken.

We review the trial court's "'legal conclusions de novo and its findings of fact for substantial evidence.'" (*People v. Perkins* (2016) 244 Cal.App.4th 129, 136 (*Perkins*).) We independently review the interpretation of a statute, whether enacted by the Legislature or through a voter initiative like Proposition 47. (*Ibid.*)

Proposition 47 reclassified certain felony and wobbler offenses as misdemeanors. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1091.) Under it, a person currently serving a felony sentence for an offense that Proposition 47 reduced to a misdemeanor

may petition for a recall of that sentence and request resentencing. (§ 1170.18, subd. (a).) Section 496, codifying receipt of stolen property, is one of the statutes that Proposition 47 amended. (§ 1170.18, subd. (a); *Perkins*, *supra*, 244 Cal.App.4th at p. 136.) At the time of defendant's conviction and sentencing, the prosecution could "plead and prove receipt of stolen property as a felony regardless the value of the stolen property." (*Perkins*, *supra*, at p. 136; former § 496, subd. (a).) But "[a]s amended by Proposition 47, section 496, subdivision (a) now specifies that 'if the value of the [stolen] property does not exceed nine hundred fifty dollars ($950), the offense shall be a misdemeanor, punishable only by imprisonment in a county jail not exceeding one year.'" (*Perkins*, *supra*, at p. 136.) Accordingly, defendant would be eligible for resentencing if the value of the stolen property at issue did not exceed $950.

In *Perkins*, this court determined that the petitioner bears the burden of establishing his or her eligibility for resentencing under Proposition 47. (*Perkins*, *supra*, 244 Cal.App.4th at pp. 136-137; accord, *People v. Bush*, *supra*, 245 Cal.App.4th at p. 1007.) In the case of receiving stolen property, this means the defendant must show that the value of the stolen property did not exceed $950, and "[t]he defendant must attach information or evidence necessary to enable the court" to make this determination. (*Perkins*, *supra*, at pp. 136-137.) Other courts that have considered the burden of showing eligibility for resentencing are in accord. (E.g., *People v. Hudson* (2016) 2 Cal.App.5th 575, 583-584, review granted Oct. 26, 2016, S237340; *People v. Johnson*

(2016) 1 Cal.App.5th 953, 962; *People v. Rivas-Colon* (2015) 241 Cal.App.4th 444, 449-450; *People v. Sherow* (2015) 239 Cal.App.4th 875, 879-880.)

Here, defendant did not establish his eligibility for resentencing because he proffered no information whatsoever to show that the value of the stolen property did not exceed $950, either in his petition or at the hearing on the petition. The court therefore properly denied his petition.

Defendant implies that we should repudiate *Perkins* because its reasoning is flawed. *Perkins* relied, in part, on Evidence Code section 500, which states: "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." *Perkins* held that, because the petitioning defendant is the party seeking relief, and because Proposition 47 does not provide otherwise, the petitioner bears the burden of establishing facts that show eligibility for resentencing. (*Perkins*, *supra*, 244 Cal.App.4th at p. 136.) Defendant asserts that the allocation of the burden of proof in Evidence Code section 500 should not apply because other sections govern the burden of proof in criminal cases. The sections he cites relate to the familiar principle that the People must prove a defendant guilty beyond a reasonable doubt. (See, e.g., Evid. Code, § 501 [statutes assigning the burden of proof in a criminal action are subject to Pen. Code, § 1096]; Pen. Code, § 1096 ["[a] defendant in a criminal action is presumed to be innocent until the contrary is proved," placing on the state the burden of proving guilt beyond a reasonable doubt].) He further asserts that putting the burden to show

eligibility on him violates his due process rights because it requires the court to assume a fact never adjudicated (the value of the stolen property exceeded $950). We are not persuaded by any of these arguments.

Notwithstanding the People's burden of ultimately proving guilt, a criminal defendant may still bear the burden of proving a defense or claim for relief, as instructed by Evidence Code section 500. (See, e.g., *Moss v. Superior Court* (1998) 17 Cal.4th 396, 425 [noting that allocating the burden of proving an affirmative defense to a defendant in a criminal proceeding is constitutionally permissible]; *People v. Barasa* (2002) 103 Cal.App.4th 287, 295-296 [holding that the defendant bore the burden of proving transported narcotics were for personal and not commercial use, so as to trigger the statute mandating probation in personal use cases].) Defendant fails to convince us that a petition for resentencing under Proposition 47 is not a claim for relief. The People are not seeking to convict defendant of a crime—he has already been convicted by virtue of his guilty plea. Nor are the People seeking to increase his punishment, which was properly imposed at the time. Instead, defendant is seeking to have his conviction reclassified and reduce his punishment. Proposition 47 is simply a "remedial statute" that "deal[s] with persons who have already been proved guilty of their offenses beyond a reasonable doubt." (*People v. Sherow*, *supra*, 239 Cal.App.4th at 880; accord, *People v. Johnson*, *supra*, 1 Cal.App.5th at p. 963, fn. 8 [noting that Proposition 47 "deals with *resentencing* a petitioning defendant whose commission of a felony has already been

proven beyond a reasonable doubt," not with "the *conviction* of a new or different crime"].)

As explained in *Sherow*, allocating the burden to defendant to show his eligibility "would not be unfair or unreasonable." (*People v. Sherow*, *supra*, 239 Cal.App.4th at p. 880 [rejecting the defendant's due process argument].) Defendant knows what kind of items he received. "A proper petition could certainly contain at least [his] testimony about the nature of the items . . . ." (*Ibid.*) If he had made at least this initial showing, the court could have taken further action to resolve any factual dispute about the value of the items or address any deficiencies in proof. (*Ibid.*; accord, *Perkins*, *supra*, 244 Cal.App.4th at p. 139.) But defendant did not make even the barest showing.

In support of his position, defendant relies on *People v. Guerrero* (1988) 44 Cal.3d 343. *Guerrero* dealt with the five-year sentencing enhancement for prior serious felony convictions pursuant to section 667. (*People v. Guerrero*, *supra*, at p. 345.) The court held that, in the context of section 667 enhancements, "the court may look to the entire record of the conviction" to determine the truth of a prior conviction allegation, and where the record does not disclose any facts of the prior offense, "the court will presume that the prior conviction was for the least offense punishable." (*People v. Guerrero*, *supra*, at pp. 352, 355.) Defendant argues that this same presumption applies in the Proposition 47 context such that the court should presume his conviction was for a qualifying offense, and the People bear the burden of showing otherwise. *Guerrero* is inapposite and inapplicable because it addressed the People's burden for purposes of

imposing a sentencing enhancement. It did not involve a claim for relief by the defendant. (*People v. Johnson, supra,* 1 Cal.App.5th at pp. 967-968, fn. 14 [rejecting the applicability of the *Guerrero* presumption in a Proposition 47 case].) As we have discussed, the People are not trying to increase defendant's punishment here.

Other cases on which defendant relies also address presumptions applicable to the People's burden in seeking increased punishment, and they do not apply for the same reason. (*People v. Rodriguez* (1998) 17 Cal.4th 253, 262 [holding that the People failed to rebut the presumption that a prior conviction was for the least offense punishable under the law, disqualifying the prior conviction as a strike]; *People v. Watts* (2005) 131 Cal.App.4th 589, 596 ["[I]f it cannot be determined from the record that the [prior] offense was committed in a way that would make it a strike, a reviewing court must presume the offense was not a strike." (Italics omitted.)].)

Because we decide this case on the basis of defendant's failure to meet his threshold burden, we need not reach his contentions about the People relying on insufficient evidence (the prosecutor's representation of the police report). Even if we agreed with defendant, the court's or the People's actions would not change the fact that "the failure of evidence began with defendant's petition." (*Perkins, supra,* 244 Cal.App.4th at p. 139.) Our affirmance is without prejudice to defendant filing a properly supported petition showing his eligibility for resentencing. (*Id.* at p. 140.)

IV. DISPOSITION

We affirm the order denying defendant's petition for resentencing without prejudice to consideration of a subsequent petition supplying evidence of his eligibility.

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RAMIREZ
P. J.

We concur:

MILLER
J.

CODRINGTON
J.